

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS LLC, et al.,)	No. 10 C 5711
)	
Plaintiffs,)	Chicago, Illinois
)	November 24, 2009
)	9:30 o'clock a.m.
-vs-)	
)	
PACKAGING CORPORATION OF)	
AMERICA, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MILTON I. SHADUR

APPEARANCES:

For the Plaintiffs:	FREED KANNER LONDON & MILLEN LLC 2201 Waukegan Road, Suite 130 Bannockburn Illinois 60015 BY: MR. STEVEN A. KANNER MR. MICHAEL J. FREED and THE MOGIN LAW FIRM 707 Broadway, Suite 1000 San Diego, California 92101 BY: MR. DANIEL J. MOGIN
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1 APPEARANCES: (Continued)

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BY: MR. R. MARK McCAREINS
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7 BY: MR. MATTHEW A. CLEMENTE

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1 THE CLERK: This is 10 C 5711, Kleen Products
2 versus Packaging Corporation of America.

3 THE COURT: If there are more persons than one out
4 on the phone, first identify yourselves, if you would, for
5 the record. And then if you have an occasion to talk again,
6 make sure that you give your name up front so that our court
7 reporter can match it with what is -- what is being said with
8 who says it. Okay?

9 MR. NEUWIRTH: Thank you, your Honor. This is
10 Stephen Neuwirth from Quinn Emanuel Urquhart & Sullivan for
11 defendant Georgia Pacific.

12 THE COURT: And you are the only one on the phone?

13 MR. THEIS: No, your Honor. This is Jack Theis
14 from Eimer Stahl Klevorn & Solberg on behalf of International
15 Paper.

16 THE COURT: Okay. And then --

17 MS. BERNAY: Good morning, your Honor, Alexandra
18 Bernay from Robbins Geller Rudman & Dowd on behalf of
19 plaintiff Thule.

20 THE COURT: Okay. And that is it on the phone?

21 MR. MOGIN: Good morning, your Honor, this is
22 Daniel Mogin on behalf of the other plaintiffs.

23 THE COURT: Okay. Now I guess we have to go from
24 left to right as I have it and the court reporter has it, and
25 so let's do that.

1 MR. KANNER: Good morning, your Honor, Steve Kanner
2 from the Freed Kanner firm in Chicago here on behalf of the
3 plaintiffs.

4 MR. MILLER: Good morning, your Honor, Marvin
5 Miller on behalf of Thule.

6 MR. FREED: Good morning, your Honor, Michael Freed
7 on behalf of class plaintiffs other than Thule.

8 MR. McCAREINS: Good morning, your Honor, Mark
9 McCareins and Jim Herbison on behalf of Smurfit Stone.

10 MR. EIMER: Good after -- good morning, your Honor,
11 Nate Eimer on behalf of International Paper.

12 MR. NICOUD: Good morning, your Honor, Trey Nicoud
13 also on behalf of International Paper.

14 MS. DIVER: Good morning, your Honor, Jennifer
15 Diver on behalf of Weyerhaeuser Company.

16 MR. FIGLIULO: Good morning, Jim Figliulo on behalf
17 of Georgia Pacific.

18 MR. MENDEL: Scott Mendel on behalf of defendants
19 Cascades and Norampac.

20 MR. MAROVITZ: Good morning, your Honor, Andy
21 Marovitz on behalf of Temple-Inland.

22 MR. LAYTIN: Dan Laytin for PCA.

23 THE COURT: Well, good morning to all of you. As
24 always, I shudder when I try to figure out the total hourly
25 rate that we are looking at here, but put that aside. And I

1 am very appreciative for all of you making yourselves
2 available on short notice, but -- and there is no reason you
3 have to be standing around for this. I want to tell you
4 where I am and why I have called this meeting. Okay? So you
5 can all be seated, if you will.

6 This request that I have made has been occasioned
7 by my having reviewed the submissions that were made in the
8 Bankruptcy Court in Delaware, although I didn't get a chance
9 to read the most recent one that just got tendered to me.
10 But I don't know if that may be another copy of the November
11 19th reply brief which I had already received. So if that is
12 the thing that got delivered physically, I have already read
13 that. Okay.

14 And that in turn caused me to review once again the
15 Consolidated Complaint in this antitrust case. If I may be
16 blunt, counsel for Smurfit-Stone are seeking to obtain an
17 order from the Bankruptcy Court that I believe it has no
18 jurisdiction to entertain, and I would be remiss if I were
19 not to order counsel for Smurfit-Stone and plaintiffs'
20 counsel who are before me to apprise the bankruptcy judge of
21 why I have concluded that.

22 Let me explain. It is just flat-out misleading to
23 characterize the lawsuit before me as seeking relief from
24 Smurfit-Stone that is at odds with its discharge in
25 bankruptcy. That I do not regard as accurate and I think --

1 although I don't like to say this, I think that
2 Smurfit-Stone's counsel really ought to know that. Although
3 the class period is defined in Paragraph 1 of the complaint
4 as running from May 2005 to the present day, and that is true
5 as to all other defendants, that is, all defendants other
6 than Smurfit-Stone, the provision of Paragraph 22 of the
7 complaint cannot be more clear. After reciting the facts, as
8 it does, about Smurfit-Stone's entry into and its emergence
9 from Chapter 11 proceedings with a discharge, the complaint
10 says this: "This complaint seeks to recover damages from
11 Smurfit-Stone for post-discharge conduct only and in no way
12 seeks to violate any orders of the above-referenced
13 Bankruptcy Court," and then goes on to identify some specific
14 post charge -- post-discharge actions that were allegedly
15 taking place in furtherance of a conspiracy.

16 Now that disclaimer, I suggest, could not be more
17 express. And I can assure you of one thing, and that is that
18 the plaintiffs are going to be held to that in my court. And
19 what do I get offered up in the way of responses from
20 Smurfit-Stone? What I view as inaccurate and impermissible
21 arguments, based on all the allegations of the complaint that
22 speak, it is true, of Smurfit-Stone's pre-discharge conduct.

23 Now why do I say that that is really misleading?
24 It is because that contention, I believe, impermissibly
25 conflates evidence with claims. It is an ironic coincidence

1 that all of you were, I guess, sitting in court when I just
2 was talking to the young lady about the employment
3 discrimination case and made exactly that distinction. And I
4 will -- I certainly wouldn't expect all you gurus in the
5 antitrust field to be generalists, as used to be the case in
6 ancient days, and to know, for example, about employment
7 discrimination, but that is exactly the same proposition,
8 that is, the conduct that was present, or allegedly present
9 -- I shouldn't be misunderstood as making any findings. I am
10 not.

11 But things that would be predischarged that could be
12 considered, for example, on the issue whether Smurfit-Stone
13 was possessed of the prohibited intent that might be an
14 element of the antitrust claim of fixing prices in restraint
15 of trade are certainly permissible. And the fact that
16 Smurfit-Stone has been washed clean of any potential for
17 damages on that score does not alter the fact that those
18 allegations may well be considered by the Court.

19 Again, you know, it is -- as I say, it was really
20 ironic because I hadn't anticipated when I asked you to come
21 in that I was going to be dealing with precisely the same
22 phenomenon in a case in another area of the law. But it is
23 just the same, that is, the idea that liability does not
24 control -- or the lack of liability does not control, the
25 appropriateness of allegations that are in the -- that are in

1 the complaint that deal with a time period for which
2 Smurfit-Stone no longer has any potential liability of the
3 type that the Bankruptcy Court could deal with appropriately.

4 Now my colleagues and I are constantly
5 encountering, I will say, misguided defense lawyers who
6 sometimes move, for example, to strike allegations relating
7 to the earlier time frame, the same sort of thing that I
8 dealt with not ten minutes before all of you stepped up here.
9 That is wrong. And it is equally wrong here.

10 Now I can tell you I don't have any desire to
11 create a tug of war or any kind of conflict with the
12 bankruptcy judge in Delaware. But what you are asking the
13 judge to do is to enjoin litigation that addresses, so far as
14 Smurfit-Stone is concerned, only a period over which the
15 Bankruptcy Court has no jurisdiction. Now every federal
16 judge has an affirmative duty to police jurisdiction. As I
17 know all the practitioners in this district are aware, I
18 regularly address sua sponte cases in which federal
19 jurisdiction is absent, either dismissing or remanding those
20 cases, as the case may be.

21 There is no lesser duty, as I view it, to protect
22 and preserve jurisdiction where it clearly exists, as it does
23 here. If injunctive relief is indeed called for, I suppose
24 that I ought to have no hesitancy in acting to enjoin
25 Smurfit-Stone from the effort to impede this Court's

1 jurisdiction.

2 Anyway, so much for my unkind comments. But I felt
3 compelled to deal with that because, as I understand it, you
4 know, you people have teed up in front of the bankruptcy
5 judge in Delaware something that urges the bankruptcy judge
6 to do something that I think is inappropriate and that is, as
7 I would emphasize again, outside of the jurisdiction of that
8 court. The Bankruptcy Court would have no business, of
9 course, enjoining or stopping this proceeding to the extent
10 that it seeks post-discharge responsibility on
11 Smurfit-Stone's part.

12 So with my having said that, I suppose I would like
13 to ask Smurfit-Stone what -- now, I read your stuff, but I've
14 got to tell you I found it unpersuasive. But maybe you have
15 got something that would overcome what I have just said.

16 MR. McCAREINS: Your Honor, Mark McCareins on
17 behalf of Smurfit-Stone in the antitrust case. Two comments.
18 First, since there is no motion pending before your Honor on
19 this point, how would you envision memorializing your Court's
20 ruling which you just gave?

21 THE COURT: I have specifically delivered it to you
22 orally, and there is a record of that. And when you want to
23 know about memorializing it, the Court's statement is
24 memorialized. And I've got to tell you I did this quite
25 deliberately.

1 Again, when I said I don't want to create a tug of
2 war, I don't want a -- I don't want to get a bankruptcy
3 judge's nose out of joint out of the sense that I have
4 intermeddled with the Bankruptcy Court's jurisdiction,
5 because I haven't. But I would also be remiss, as I say, if
6 the bankruptcy judge didn't have before him the views of this
7 Court in connection with what is -- has been tendered there
8 as a request for preliminary injunctive relief that I think
9 is out of bounds. And so that is -- I didn't -- you know, I
10 haven't -- although I am -- as you know, I am not hesitant to
11 commit myself to paper, and it is not just the fact that my
12 secretary happens to be away in Hawaii on vacation. That is
13 not really the issue.

14 But I felt that it would be most appropriate, given
15 what I understand to be the timetable and the fact that the
16 issues have been posed to the Bankruptcy Court, at a minimum
17 I think that report should be made to the Bankruptcy Court
18 about the views that I have just expressed.

19 Now, I am not -- you know, I am not going to order
20 the Bankruptcy Court to do anything. Of course not. But I
21 do have power over the litigants, and so if I were to say,
22 "Smurfit-Stone, subside," I would expect they wouldn't want
23 to run the risk of contempt over here. But who wants -- who
24 wants to do something like that? I don't. But again, you
25 know, I thought through this thing, as you might gather, and

1 I read through the Complaint, and it confirmed exactly what I
2 had thought from day one.

3 And somehow the -- what I consider misguided is the
4 effort to sort of scrap the allegations in the Complaint that
5 it is quite true do not serve as a basis for liability for
6 Smurfit-stone because it is discharged, it is washed clean of
7 anything in terms of potential liability for those earlier
8 acts, if they occurred. Don't misunderstand, if they
9 occurred. But to say those don't belong in the Complaint
10 because of the fact that there is no liability is a
11 misunderstanding, I think, of what the law is and ought to
12 be. And you could not -- you know, we are dealing with good
13 lawyers on all sides here. And I don't think that the
14 Consolidated Complaint could have been more precise and more
15 obvious and more clear and more accurate in what I just read
16 than it has been.

17 So that is -- that is my message to you, and I
18 would hope that a word to the many wise ones here would be
19 sufficient.

20 MR. McCAREINS: One other thought. I am not
21 counsel to Smurfit in the bankruptcy matter.

22 THE COURT: Yeah.

23 MR. McCAREINS: Matt Clemente from Sidley & Austin
24 is here who represents Smurfit in the bankruptcy proceeding.

25 MR. CLEMENTE: Good morning, your Honor.

1 MR. McCAREINS: And, Matt, would you like to
2 address any of these issues?

3 THE COURT: Sure.

4 MR. CLEMENTE: I would. Thank you, your Honor.
5 For the record, Matt Clemente, Sidley Austin, on behalf of
6 Smurfit-Stone Container Corporation. And, your Honor, I do
7 appreciate your comments. And just as an initial matter, we
8 will be certain to inform Judge Shannon of your comments
9 today. So rest assured we will absolutely take care to do
10 that.

11 Your Honor, as you may or may not know, I have been
12 counsel to Smurfit throughout its Chapter 11 reorganization
13 proceedings which concluded on June 30, 2010, with the entry
14 of a confirmation order, a key provision of which, as your
15 Honor is aware, is a discharge and a discharge injunction.

16 THE COURT: Right. And you are out. Okay.

17 MR. CLEMENTE: Well, we are out. However, your
18 Honor, I was slightly disturbed by what I heard your Honor
19 say today for obvious reasons. Are you suggesting that we
20 are out, but we are not really out?

21 THE COURT: Oh, no, on the contrary. What I am
22 saying -- you know, here: For example, Smurfit-Stone clearly
23 has to respond to discovery. The fact that it is discharged
24 from liability for that doesn't say that it is -- that from
25 the beginning of the world to the date of June 30th has

1 vanished from the scene. It hasn't. It existed. And
2 whatever happened during that earlier period may be relevant
3 in this action to the extent that it bears upon
4 Smurfit-Stone's potential liability from the time of
5 discharge forward. If --

6 MR. CLEMENTE: That is where, your Honor, we would
7 have a slight disagreement.

8 THE COURT: Suppose that somebody murdered somebody
9 else and then has -- and then a conviction is vacated for
10 that. And then the person comes along and kills somebody
11 else afterwards. The idea that the Court should put on
12 blinders in terms of sentencing and say, "Oh, well, that
13 never existed," is just unrealistic. You know, in the
14 criminal field as well we often look at situations in which
15 there is no potential for punishment or for sanctions or
16 anything else in an earlier time, and yet we are aware of the
17 matter and take it into account. No different, really.

18 MR. CLEMENTE: Your Honor, I would actually
19 respectfully disagree with that, although I --

20 THE COURT: You can.

21 MR. CLEMENTE: Although I believe reorganization
22 proceedings are crucially important, it is clearly not on the
23 level of murder proceedings. I wouldn't purport to suggest
24 that.

25 But what we have here, your Honor, is a situation

1 where a group of plaintiffs who have not disputed the notice
2 of the bankruptcy process, have not disputed the things that
3 give rise to a claim that accrued prior to the discharge,
4 made a decision to wait until after the discharge was entered
5 to prosecute this particular proceeding. And then they are
6 using --

7 THE COURT: So what is wrong with that?

8 MR. CLEMENTE: I am going to get to that, your
9 Honor. Then they are using the strength of allegations
10 related to pre-discharge conduct. Your Honor, we also
11 examined the Complaint, including the speaking notice that
12 was filed yesterday in front of your Honor. And if I might
13 quote: "Such allegations are clearly relevant to this
14 antitrust case; however, since they provide background
15 concerning Smurfit-Stone's participation in an illegal
16 conspiracy, which knowledge was carried over by senior
17 executives to Smurfit-Stone in its post bankruptcy conduct."
18 Your Honor, what they are trying to do is they are trying to
19 say, "We had a claim prior to the discharge. We chose not to
20 pursue it. Now we are going to pursue that very same claim
21 and say, you know what, we are just going to limit liability
22 for post-discharge conduct, but we are going to bootstrap" --

23 THE COURT: Not in my court are they going to be in
24 a position to do what you characterize as pursue a claim.
25 There is one way to pursue a claim, and that is to seek to

1 obtain a judgment. That is how you pursue a claim. They are
2 clearly not going to get any kind of relief, any kind of
3 judgment that stands -- that is based upon -- predischarge
4 conduct. That is a very different phenomenon from the one
5 that I talked about, and that is that predischarge conduct
6 may well be taken into account. And by the way, you know, I
7 read their response. I wasn't -- I was not taken by the fact
8 that they chose to rehash early on all of the substantive
9 part because that is really -- I am talking about their
10 response in the Bankruptcy Court.

11 MR. CLEMENTE: I understand, your Honor.

12 THE COURT: Because that, as far as I am concerned,
13 was really irrelevant. They are not -- they are not proving
14 their case before the Bankruptcy Court in Delaware.

15 MR. CLEMENTE: I understand, your Honor.

16 THE COURT: And they shouldn't try. But again I
17 think that what you have said really does not face up to the
18 points that I have made, and that is that -- that I am going
19 to be very careful, I can assure you, to separate out any
20 prospect of seeking liability for pre -- for predischarge
21 conduct.

22 But the notion that, as I say, the Court should don
23 blinders and not take matters into his -- suppose -- again,
24 you know, it really is a parallel. If there is -- if what we
25 have as a necessary ingredient of an antitrust claim is bad

1 intent, okay, and bad intent can be manifested by earlier
2 conduct that creates inferences about current intent -- that
3 happens all the time and it does not get in the way of
4 404(b), incidentally, because it is one of the things that
5 404(b) quite expressly excludes from the notion of
6 inadmissibility.

7 So again I think we are functioning somewhat at
8 cross-purposes, because I know you have got -- you know, you
9 have got a mindset that is -- that is a proper advocate's
10 mindset. But I've got to tell you I am not bringing an
11 advocate's point of view to this one. I am bringing what is
12 an objective and, I trust, judicial -- and I trust as well
13 judicious -- point of view to the point that I am dealing
14 with.

15 So you people go ahead and -- but I've got to tell
16 you, I would urge that given the characterization that I have
17 just placed, it is not well-considered to be seeking an
18 injunction against their proceeding on a post-discharge
19 theory of liability against Smurfit-Stone and to place that
20 before a Bankruptcy Court that really has no jurisdiction.
21 Once the discharge is made, that is out.

22 And indeed there are a number of cases that they
23 cited that basically say that a party that has been
24 discharged from bankruptcy is not then insulated from
25 post-discharge responsibility for whatever conduct that might

1 be actionable. That is all we are going to be looking at
2 here.

3 Again I can assure you I am not going to permit
4 anything other than the representation that they have made
5 here in the paragraph that I read as establishing any
6 predicate for a potential liability on the part of
7 Smurfit-Stone.

8 But if it is engaged indeed in a conspiracy, the
9 notion that it should not be responsible, when the alleged
10 co-conspirators are, would I think really offend the justice
11 system. Why should -- why should you be -- go clean, if that
12 is true -- and again I emphasize I am not making any findings
13 -- when everybody else may be on the hook? It is just not
14 right, and it is not the law.

15 MR. CLEMENTE: Your Honor, if I may, the only
16 distinction that I would continue to urge your Honor to
17 consider is, again, had this claim been brought in a
18 bankruptcy context as an initial matter, like we believe it
19 should have been, there would have been an adjudication,
20 perhaps in front of a nonbankruptcy forum. I am not
21 suggesting it would have been Judge Shannon ultimately making
22 that adjudication. But what would have not have happened if
23 -- had that claim been adjudicated and dealt with in the
24 bankruptcy process, three months later an additional
25 complaint could have been filed alleging pre-petition --

1 predischarge conduct being relevant to that post-discharge
2 claim that they are alleging. That is the point that we are
3 trying to make, your Honor. There is a distinction there
4 that they cannot stand on the sidelines while the bankruptcy
5 process goes forward, okay, and then arise three months later
6 and say --

7 THE COURT: The consequence -- the consequence of
8 their, as you put it, having stood on the side is that they
9 have no ability to advance a claim based on the predischarge
10 conduct. That is the consequence. They are stuck. Okay?
11 But the idea that you should somehow ease yourself out of
12 this lawsuit on that basis is just wrong.

13 And I know that we all get boring when we repeat
14 ourselves, and I am no exception to that. But I've got to
15 tell you that you really have not -- I think you may have
16 lost your moorings on that one, because you haven't really
17 thought through what the effect is of, as you put it, their
18 not having presented that to the Bankruptcy Court. Suppose
19 they had. What would have happened is exactly the same thing
20 that has happened now, and that is the Bankruptcy Court would
21 have rejected it as one of the claims --

22 MR. CLEMENTE: Correct.

23 THE COURT: -- and it is gone as a claim. Again,
24 that doesn't go to the issue --

25 MR. CLEMENTE: And it would have been dealt with in

1 the bankruptcy context and it would have been treated in
2 accordance with the bankruptcy plan. What we have now here,
3 your Honor, is a post -- an alleged post-discharge claim that
4 is being proven -- or allegedly being proven based on
5 pre-discharge conduct that would allow collection of monies to
6 advance on top of --

7 THE COURT: Did you ever see Cool Hand Luke?

8 MR. CLEMENTE: Part of it, I must admit, your
9 Honor.

10 THE COURT: "What we have here is a failure to
11 communicate." And you just haven't gotten it.

12 MR. CLEMENTE: No, your Honor, I do get where you
13 are coming from, your Honor.

14 THE COURT: I guess not. But I really have said
15 all that I have to say this morning.

16 I thought it was important to get the message over
17 to everybody, because it affects this Court's jurisdiction.
18 And this Court has just as much of an obligation, as I say,
19 to preserve its jurisdiction as it does to reject
20 jurisdiction if it doesn't exist. So that is where we are.
21 Okay?

22 Thank you all.

23 MR. CLEMENTE: Thank you, your Honor.

24 MR. McCAREINS: Thank you, your Honor.

25 MR. EIMER: Have a nice holiday.

1 THE COURT: Pardon?

2 MR. EIMER: Have a nice holiday.

3 THE COURT: Thank you. You too.

4 MR. EIMER: Thank you.

5 THE COURT: I guess all but Smurfit-Stone.

6 (Which were all the proceedings heard.)

7 CERTIFICATE

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled matter.

10

11 s/Rosemary Scarpeilli/

Date: November 24, 2010

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